Supreme Court, U.S.
FILED
NOV 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1735

In the Supreme Court of the United States

OCTOBER TERM, 1986

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
PETITIONERS

v.

OUTBOARD MARINE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO VACATE

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The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency and the Environmental Protection Agency (EPA), respectfully moves that the judgment of the court of appeals be vacated and the case remanded for further consideration in light of the amendment of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9604(e), by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 104(m) (Oct. 17, 1986).

1. The question presented by the petition for a writ of certiorari, granted by the Court on October 6, 1986, is (Pet. I):

> Whether Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9604, which authorizes the Environmental Protection Agency to take removal and remedial action when there is a release or

> substantial threat of release of a hazardous substance, provides the right to enter private property to design and implement the appropriate removal or remedy.

At the time of the court of appeals' decision and this Court's order granting the petition for a writ of certiorari, Section 104(a) of CERCLA, 42 U.S.C. 9604(a), gave EPA broad authority, whenever there is a release or substantial threat of release of a hazardous substance, "to act * * * to remove * * * and provide for remedial action relating to such hazardous substance * * * or take any other response measure" deemed necessary (Pet. App. 39a-40a). Section 104(b), 42 U.S.C. 9604(b), authorized EPA to "undertake such planning * * * engineering * * * and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions" (Pet. App. 40a-41a).

On the basis of this authority, EPA obtained a magistrate's warrant authorizing entry to respondent's property at Waukegan, Illinois, to obtain information necessary to complete design plans and specifications to remedy polychlorinated biphenyl (PCB) contamination on that property and in portions of Waukegan Harbor adjacent to that property (see Pet. 4-5). The magistrate, and subsequently the district court, held that Section 104 of CERCLA implicitly authorized EPA to enter the site for the requested design actions (see Pet. 4-6). On September 23, 1985, the court of appeals reversed and remanded, holding that EPA had no implicit authority under Section 104 to enter private property to design and implement a hazardous waste remedy. The court stated (Pet. App. 14a):

> Perhaps congressional failing to provide for the circumstance which we face was a mere oversight, but this court is not a committee to consider statutory amendments.

Similarly, in opposing the petition for a writ of certiorari, respondent argued that it "is up to Congress to vest the

EPA with additional authority if it so chooses" (Br. in Opp. 15).

2. In its petition, the United States advised the Court that Congress was considering amendments to CERCLA which, among other things, would expressly reaffirm EPA's broad access authority under Section 104, and which would supersede the court of appeals' decision in this case, making plenary review by this Court unnecessary (Pet. 16-17 & n.22). The President on October 17, 1986, signed the Superfund Amendments and Reauthorization Act of 1986, which explicitly authorizes the necessary access.[1] Pub. L. No. 99-499 (Oct. 17, 1986).[2] The Act amends Section 104(e), adding a new Section 104(e)(1) and (3) (Pub. L. No. 99-499, § 104(m)):[3]

> (e) Information gathering and access.—
>
> (1) Action authorized.—Any officer, employee, or representative of the President, duly designated by the President, is authorized to take action under paragraph (2), (3), or (4) * * * at a vessel, facility, establishment, place, property, or location or, in the case of paragraph (3) or (4), at any vessel, facility, establishment, place, property, or location which is adjacent to the vessel, facility, establishment, place, property, or location referred to in such paragraph (3) or (4). * * *
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> * * * * *

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[1] With limited exceptions not relevant here, the Act became effective on the date of enactment. See Pub. L. No. 99-499, § 4.

[2] We are lodging a copy of that Act with the Clerk of this Court.

[3] The report accompanying the Senate bill (S. Rep. 99-11, 99th Cong., 1st Sess. (1985)), which contained similar access authority (H.R. 2005, 99th Cong., 1st Sess. § 120(1)(B) (1985); 131 Cong. Rec. S12184, S12189 (daily ed. Sept. 26, 1985)), stated that: "The amendment confirms the broad access authority the that Congress originally intended when CERCLA was enacted in 1980." (S. Rep. 99-11, *supra*, at 26).

> (3) Entry.—Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following:
>
> * * * * *
>
> (D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this title.

These amendments render moot the single issue with respect to which certiorari was granted in this case, that is, the scope of EPA's entry authority under the prior, but now-superseded, Section 104. *United States Department of Justice* v. *Provenzano,* 469 U.S. 14, 15 (1984). The question of access authority under Section 104 of CERCLA must now be judged under the law presently in effect. 469 U.S. at 15 (citing *DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974); *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971)).

While the issue this Court has agreed to review is now moot, the case remains alive. EPA still seeks to enter the property for the requested design activities.[4] The extent of EPA's authority under the amended statute should be considered by the courts below. Thus, we submit that this Court should vacate the judgment of the court of appeals, and remand the case for further proceedings in light of the intervening change in the law. The Court has consistently followed this course in similar circumstances. See, *e.g.*, *United States Department of Justice* v. *Provenzano,* 469 U.S. at 15-16; *United States Nuclear Regulatory Commission* v. *Sholly,* 459 U.S. 1194 (1983); *Diffenderfer* v. *Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412,

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[4] Furthermore, the court of appeals, in deciding the access issue, did not reach other issues before it (compare Pet. App. 10a-15a with 23a-35a).

415 (1972). Cf. *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).[5]

It is therefore respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of Section 104(m) of Pub. L. No. 99-499.[6]

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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[5] This practice is, of course, similar to the Court's very frequent practice of vacating judgments and remanding cases for reconsideration in light of intervening decisions of this Court.

[6] There are presently pending before this Court respondent's petition for a writ of certiorari (No. 86-280) seeking review of an unrelated issue in this litigation, and its motion to consolidate the two matters. The recent amendments to CERCLA do not impair the reasons given in our brief opposing certiorari in No. 86-280. Because those amendments do, however, render unnecessary the plenary consideration of the issue raised in our petition, the motion to consolidate is without foundation.

U.S. GOVERNMENT PRINTING OFFICE: 1986—191-483/40067